



In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1714

HARRIET PAULEY, SURVIVOR OF JOHN C. PAULEY,
PETITIONER

v.

BETHENERGY MINES, INC., AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

**SUPPLEMENTAL BRIEF FOR THE
FEDERAL RESPONDENT**

In the government's response to the petition for a writ of certiorari, we noted (see pp. 3-4 n.1 & p. 9) that petitioner Harriet Pauley had not been substituted as the claimant, and that the Director, Office of Workers' Compensation Programs, had requested that the Benefits Review Board, where this case is pending on remand from the Third Circuit, substitute Harriet Pauley as a party *nunc pro tunc*. On August

14, 1990, the Benefits Review Board granted that motion. A copy of the Director's motion and a copy of the Benefits Review Board's order are appended.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

AUGUST 1990

APPENDIX A

UNITED STATES DEPARTMENT OF LABOR BENEFITS REVIEW BOARD

BRB No. 88-2565 BLA
Case No. 85-BLA-2137
OWCP No. 187-14-5737

JOHN PAULEY, CLAIMANT-RESPONDENT

v.

BETHENERGY MINES, INC., EMPLOYER-PETITIONER
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
PARTY-IN-INTEREST

MOTION TO SUBSTITUTE HARRIET PAULEY, NUNC PRO TUNC, FOR HER DECEASED HUSBAND, JOHN PAULEY

Pursuant to 30 U.S.C. 932(l) and 20 C.F.R. 802.219, the Director, Office of Workers' Compensation Programs, by his undersigned attorneys, hereby moves the Board for entry of an order substituting Harriet Pauley as the claimant-respondent in this case, effective nunc pro tunc to the date of her husband, John Pauley's death. As grounds for this motion, the Director shows as follows:

1. This case concerns John Pauley's claim for Black Lung benefits, filed April 11, 1978. Exh. A.

(1a)

at 1-4. On May 3, 1988, the administrative law judge issued a decision and order awarding him benefits, augmented by reason of Pauley's dependent spouse. *Id.* at 5-20. On June 27, 1988, the ALJ denied the employer's motion for reconsideration (*id.* at 21-23) and, on July 20, 1988, the employer appealed to the Board. *Id.* at 24-27.

2. On December 30, 1988, while this appeal was pending before the Board, the claimant, John Pauley, died. See Exh. B at 1 (copy of death certificate). Harriet Pauley is the surviving spouse. See *id.* at 2 (copy of DX 10, marriage certificate).

3. On March 28, 1989, the Board issued a decision and order affirming the award of benefits. Exh. C. The caption of this decision and order lists John Pauley, rather than Harriet Pauley, as the claimant-respondent.

4. On December 7, 1989, the Third Circuit granted the employer's petition for review and reversed the award of benefits. *Bethenergy Mines, Inc. v. Director, OWCP*, 890 F.2d 1295 (3d Cir. 1989). On February 6, 1990, the court denied the claimant's petition for rehearing. John Pauley was listed as the claimant-respondent in the Third Circuit.

5. The Third Circuit's decision remanded the case to the Board "for entry of an order denying benefits." 890 F.2d at 1303. The case is pending before the Board.

6. On May 7, 1990, Harriet Pauley, as the survivor of John Pauley, filed a petition for a writ of certiorari, No. 89-1714 (S. Ct.). The petition is pending before the Supreme Court, but no stay of proceedings has been requested pending the Court's disposition.

7. Because John Pauley had been determined to be eligible for benefits when he died, his surviving

spouse, Harriet Pauley, remained eligible on her husband's claim after his death without having to refile or otherwise validate his claim. See 30 U.S.C. 932(l); *Rosebud Coal Sales Co. v. Weigand*, 831 F.2d 926, 928 (10th Cir. 1987). See also 20 C.F.R. 725.1(a), 725.212.

7. The substitution of Harriet Pauley is necessary to reflect her status as the named petitioner in the Supreme Court. Substitution nunc pro tunc, effective retroactive to the date John Pauley died, is necessary to reflect Harriet Pauley's continuing eligibility for benefits on her husband's claim.

8. Counsel for the other parties to this case, Bethenergy Mines, Inc. and Harriet Pauley, have stated that they do not object to the granting of this motion.

WHEREFORE, the Director requests the Board to enter an order substituting Harriet Pauley for John Pauley as the claimant-respondent in this case, and requests that the order be effective nunc pro tunc to the date of John Pauley's death.

Respectfully submitted.

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor for
Special Appellate and
Supreme Court Litigation

/s/ Edward D. Sieger
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APPENDIX B

UNITED STATES DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
1111 20th St., N.W.
Washington, D.C. 20036

BRB No. 88-2565 BLA
Case No. 85-BLA-2137
OWCP No. 187-14-5737

HARRIET PAULEY (Widow of JOHN PAULEY),
CLAIMANT-PETITIONER

v.

BETHENERGY MINES, INC., EMPLOYER-PETITIONER
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PRO-
GRAMS, UNITED STATES DEPARTMENT OF LABOR,
PARTY-IN-INTEREST

[Filed Aug. 14, 1990]

ORDER

On June 4, 1990, the Board issued an Order pursuant to the decision of the United States Court of Appeals for the Third Circuit in *BethEnergy Mines, Inc. v. Director, OWCP*, — F.2d—, No. 89-3364 (3d Cir. Dec. 7 1989), vacating the prior Decision and Order awarding benefits in this case. The Board's Order did not address a pending motion filed by the

Director on May 30, 1990, to substitute Harriet Pauley for her deceased husband, John Pauley. Subsequently, the Board issued an Order on July 23, 1990, denying the Director's motion for lack of jurisdiction.

On July 24, 1990, the Director filed a motion for entry of an Order denying benefits in accordance with the court's mandate. Although the June 4, 1990, Order was issued following the court's mandate, it was incomplete in that it vacated the Board's opinion without also vacating the administrative law judge's Decision and Order which awarded benefits and thus did not finally resolve the status of claimant's claim. Accordingly, pursuant to the opinion of the court in this case, the prior decisions awarding benefits are vacated, and benefits are denied.

In addition, on August 1, 1990, the Director filed a motion for reconsideration of the Board's Order denying its motion to substitute Harriet Pauley for her husband John Pauley, the deceased miner. The Director's motion for reconsideration is granted. As the Director's motion for substitution is not opposed by any party, it is granted. Accordingly, Harriet Pauley is substituted as the claimant in this case.

/s/ Roy P. Smith
ROY P. SMITH, Chief
Administrative Appeals
Judge

/s/ Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals
Judge

6a

/s/ Regina C. McGranery
REGINA C. MCGRANERY
Administrative Appeals
Judge

Dated this 14th day of
August 1990